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CASE NO. _____

In the
SUPREME COURT OF THE UNITED STATES

SHONTA MICHAEL,
Petitioner,

v.

CATERPILLAR FINANCIAL
SERVICES CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

ESKINS, KING & SEVIER, PC
Counsel of Record
Bradley W. Eskins
50 North Front Street, Suite 770
Memphis, Tennessee 38103
(901) 578-6902

QUESTION PRESENTED

Whether trial and appellate courts are appropriately analyzing the facts and law at the pretext stage in Title VII cases by appropriately reviewing all the facts and the law in the light most favorable to the non moving party and thereby preserving a plaintiff's statutory and constitutional right to trial by jury.

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. **Shonta Michael, Plaintiff/Appellee;**

2. **Caterpillar Financial Services Corporation, Defendant/Appellant;**

3. **Bradley W. Eskins, Attorney for the Plaintiff/Appellee; and**

4. **Joseph Turner,** Attorney for the Defendant/Appellant; and

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PETITION FOR WRIT OF CERTIORARI

Petitioner Shonta Michael respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the district court (App., *infra*, 1a-17a) is an unreported opinion reported at 2006 WL 1454734. The opinion of the court of appeals (App., *infra*, 17a-54a) reported at 496 F.3d 584.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on July 31, 2007. This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 2000e-2(a)(1)

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

The district court dismissed Michael's case holding that as a matter of law, the adverse employment actions that she complained of were not materially adverse pursuant to prior Sixth Circuit case law. However, pending before this Court was *Burlington Northern and Santa Fe Railway Co. v. White,* 126 S.Ct. 2405, 2415, 165 L.Ed.2d 345 (2006) wherein this Court held that a materially adverse employment action in the retaliation context consists of any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

On appeal, The United States Court of Appeals for the Sixth Circuit affirmed the district court's order on separate grounds. The Court of Appeals held that due to this Court's Ruling in *White* that the treatment complained of by Plaintiff was materially adverse and just might "dissuade a reasonable person from exercising their statutory rights and complaining about discrimination in the workplace." Nonetheless, the Sixth Circuit found that as a matter of law, based upon the evidence in the record that Michael could not come forward with sufficient evidence to show that Caterpillar's legitimate non discriminatory reason for its actions against Michael were pretext for unlawful discrimination.

FACTS

This case arises out of a conflict that Michael experienced with a manager at Caterpillar named Patricia Henry, who had recently replaced Michael's prior manager, Holly Tomlinson. Henry and

Caterpillar insist that the conflict and subsequent disciplinary measures came about solely because of issues with Michael's performance, whereas Michael asserts that Caterpillar engaged in race-based discrimination, retaliation, and harassment.

Michael began working for Caterpillar in August of 1997, just after graduating from college. In September of 2003, she accepted a transfer from Caterpillar's Peoria, Illinois office to its Nashville, Tennessee facility to become an asset manager in the accounting department. Her new position required her to supervise two other employees: James Gooden, a Caucasian, and Pam McGhee, an African-American. Adrena Holland, an African-American, later replaced McGhee as a temporary employee during McGhee's maternity leave. Similarly, Tomlinson initially served as Michael's immediate supervisor, but she was subsequently replaced by Henry, another cost-accounting manager, effective January 13, 2004. Both Tomlinson and Henry reported directly to Financial Accounting Manager Diane Rezaii. Tomlinson, Henry, and Rezaii are all Caucasian.

On or around December 13, 2003, Rezaii held a meeting with Henry, Tomlinson, and Michael to discuss the status of work in the accounting department. Rezaii claims that Michael arrived late to this meeting; Michael responds by saying only that she cannot recall the meeting.

1. Michael's performance evaluation

On January 8, 2004, Michael met with Tomlinson to review a written performance evaluation of Michael.

The evaluation rated Michael quite favorably. It noted that "[s]he seems to have a good report [sic] with her staff," but also listed "developing others" and "managing performance" as an "opportunity for development" rather than a "strength." At the same meeting, Rezaii awarded Michael an "Eye on Quality Award" worth $50 that recognized her for excelling in "customer service" and for the qualities of "responsibility," "care for others," and "exceeding expectations." Although Tomlinson asserts that she informed Michael during the meeting that she needed to do a better job of attending meetings on time, Michael disputed that this occurred and stated that if this was a problem the company would have documented he issue in her performance evaluation.

Following this performance review, a second meeting among Michael, Henry, and Rezaii was held on January 14, 2004. Both Henry and Rezaii allege that Michael was late to the meeting, but this is disputed by Michael. Although the company allege that Michael was ate for these meetings, no one in the Nashville office document the alleged issue of being late for the meetings.

2. Michael working from home and Gooden's complaint, both on January 16

Michael admits that on January 16, 2004 she worked from home rather than coming in to her office in Nashville. Michael worked late the previous night and then woke up early the next morning, all in order to complete a time-sensitive year-end report that she had been assigned to produce. According to Michael, Tomlinson had implicitly authorized her to work from home by stating the she should "do what

she had to do" to complete the report. Rezaii stated in her deposition that the reports Michael was required to complete in less than on week normally take two to three individual two weeks to complete.

Michael in her deposition stated that Tomlinson had not specifically authorized her to work from home that day, saying that "[s]he never gave me direct authorization, not in those words." However, the purpose of giving employees the laptop computer was to allow employees to access the company system away from work.

During the course of the day, on January 16, 2004 Michael's online calendar listed her as "busy" but she responded to emails from Henry. In the e-mails, Henry did not ask Michael whether she was at work or not. Also, Michael began working from home early in the morning, and continued working and sending emails until 2:00 or 3:00 p.m. in order to complete the time sensitive end of the year reports that normally take two employees two weeks to complete.

Also on January 16, 2004, Gooden, one of Michael's subordinates, (who is white) reported to work intoxicated and allegedly complained to Rezaii about Michael's management style. According to Rezaii, Gooden asserted that he felt degraded by Michael because she would make him perform personal errands such as bringing her water, retrieving paper off the printer, or picking up lunch for Michael at Captain D's restaurant. Michael disputes the substance of the allegations, but she does not contest the fact that Gooden indeed lodged a complaint. Gooden also complained to Rezaii that Michael made a practice of calling McGhee and Holland, Michael's

other two subordinates, at home-sometimes as early as 5:00 a.m. Michael does not deny this specifically, but objects to the allegation as hearsay. When asked in her deposition if she felt that calling a subordinate at home at that hour of the morning was reasonable, she replied that it was. Rezaii relayed Gooden's concerns over Michael's management style both to Henry and to Senior Human Resources Generalist Jackie Sweeney, who said that she would investigate the complaints.

3. January 20 meeting between Michael and Henry

Caterpillar employees observed the Martin Luther King, Jr. holiday on January 19, 2004, so the next working day after January 16 fell on January 20. The events of that day are the basis for the bulk of Michael's claims. On the morning of January 20, Henry scheduled an 11:00 a.m. meeting with Michael. Henry asserts that one of the purposes of the meeting was to discuss Michael's unauthorized absence on January 16, but Michael disputes this, stating that her understanding was that the meeting was solely to discuss business-related matters. Michael acknowledges that, at 11:05 a.m., she had not yet arrived at Henry's office for their scheduled meeting. Instead, Henry located Michael at another meeting that had run over. Henry asked Michael at that point when she planned to arrive for their 11:00 a.m. meeting. According to Michael, Henry voiced this inquiry "in a very aggressive tone" that "rudely interrupted" the meeting Michael was then attending. Michael replied that she would meet with Henry in five minutes. McGhee and Holland, who saw Henry looking for Michael, reported that Henry appeared angry at the time.

Michael testified in her deposition that she arrived at Henry's office at approximately 11:15 a.m. What transpired next is the subject of dispute between the parties. Michael asserts that she began the meeting by apologizing for being late, but that "Ms. Henry became very aggressive, started saying yeah yeah you are going to be sorry ... then pointed a finger in Ms. Michael's face and got so close to Ms. Michael that she could smell the nicotine from her cigarettes on her breath." According to Michael, Henry then "started jumping up and down in her chair saying you are going to pay no matter what."

At that point, Michael allegedly told Henry that she did not feel comfortable in the meeting and requested that a third party from human resources be called to join them. Henry purportedly complied with this request by contacting Sweeney, but was only able to leave a message for her. Michael testified in her deposition that she then left the room because she "felt threatened, felt like Ms. Henry wanted to physically harm her, felt nervous and uncomfortable."

Henry's account of the meeting differs significantly. She asserts that Michael was the aggressor, raising her voice during the meeting, refusing to answer questions, slapping her hand on Henry's desk, interrupting Henry, and criticizing her management skills. [1]

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[1] The crux of the case bears upon the credibility of the witnesses. The EEOC during its investigation noted that the company witnesses were not credible and indeed did not believe their explanation of the treatment of Michael. In addition, most of the witnesses did not fair better during their independent

Following the meeting, both Michael and Henry contacted Caterpillar's human resources department. Michael lodged a complaint describing Henry's behavior as noted above, but made no mention of any race-based discriminatory animus. Henry, too, proceeded directly to human resources and reported what she viewed as Michael's inappropriate behavior.

4. Sweeney's investigation

At some point on January 20, 2004, Sweeney began investigating both Michael's and Henry's separate complaints regarding the confrontational meeting, as well as Gooden's earlier complaint concerning Michael's management style. Among those interviewed by Sweeney was a Caterpillar employee named John Jubert, who sat two cubicles away from Henry's office. Jubert told Sweeney that Michael was standing and screaming during the meeting, and that, at one point, he thought Michael might physically strike Henry. He also reported to Sweeney that Henry calmly asked Michael to leave her office on several occasions, but that Michael refused and continued to scream at Henry. Michael disputes this account as reported by Sweeney, and objects to it as hearsay. None of the other employees seated near Henry's office professed any knowledge of the meeting.

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depositions. Although Michael must concede that this is not evidence in this case, this information is crucial in that black and white words on a page do not accurately nor completely tell the story in the discrimination context and courts should not take cases away from juries where there are disputed issues of fact that MUST be weighed by the jury.

Sweeney's investigation of Gooden's complaint about Michael included interviews with all of Michael's subordinates. McGhee, one such subordinate, informed Sweeney that Michael was very demanding and would call her throughout the day, which made it difficult for McGhee to complete her tasks. She said that she had heard of Michael asking others to perform personal tasks, but that she had never been so asked. Holland, another of Michael's subordinates, reported to Sweeney that she had never been managed in the way that Michael managed her, and that she was ready to quit because of the pressure Michael placed on her. Michael objects to both of these statements as hearsay evidence.

In addition to interviewing Michael's subordinates, Sweeney spoke with other Caterpillar employees regarding their interactions with Michael. Steve Elsesser, the controller for the Nashville office, informed Sweeney that Michael had been a "challenge" to work with because she was frequently late to meetings, sometimes interrupted others during meetings, and had difficulty completing tasks on time. Sweeney also spoke with Roland Moseley, a business and asset manager in the accounting department, who noted that Michael failed to attend several scheduled training sessions and that, when she did attend, she often arrived late.

The next day, January 21, 2004, Michael met separately with both Rezaii and Elsesser. She expressed to both her belief that Henry had mistreated her, but according to Rezaii and Elsesser, Michael did not specifically assert that she had been

discriminated against. Michael claims in response only that she "tried" to tell both about Henry's "discriminatory type of behavior," but was unable to do so. On or about January 22, 2004, Michael also spoke with Human Resources Specialist Carla Alexander and specifically alleged that Henry's conduct was racially motivated.

5. Disciplinary actions

Michael met with Rezaii and Sweeney on January 22, 2004. During the meeting, Rezaii explained that both the human resources department and upper management were still investigating the situation and were considering their options. Rezaii said that these options included termination, adding that Michael "should be happy to have a job." Michael was told to take paid administrative leave pending the investigation and to report for work on Monday. Rezaii also asked Michael to return her company-issued laptop computer.[2]

The following Monday, January 26, 2004, Michael again met with Rezaii and Sweeney. At this second meeting, Rezaii explained to Michael that she had the option of either staying at her current position

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[2] The above actions taken by Rezaii against Michael directly violated Caterpillar's Policy 701 which was attached to the record on appeal. Policy 701 is Caterpillar's guideline for management that requires managers to take certain actions in order to deal with employee performance issues. Although it was undisputed that Michael did not have any prior written performance issues, Rezaii's actions went above what is required in Policy 701 a mere two weeks after she awarded Michael with an eye on quality award for care for others, exceeding expectations and responsibility.

and being placed on a 90-day "Step 1 Performance Plan" or accepting a lateral assignment to a different position that involved the same pay and benefits. Michael notified Rezaii by email on Wednesday, January 28 that she would accept the first option and stay in her current position on a 90-day performance plan.

Michael next met with Rezaii and Henry on Thursday, January 29, 2004 to discuss her performance plan. The performance plan identified seven areas in which Michael needed to improve over the following 90 days, including notifying management if she would not be in the office, improving her timely attendance at business meetings, refraining from treating her staff as personal assistants, and refraining from contacting her staff outside of normal business hours.

According to the plan, Henry and Michael were scheduled to meet on a weekly basis so that Henry could track Michael's progress. Michael's performance in the targeted areas would be reviewed and, if significant improvement was not shown, further disciplinary action could occur. Michael characterizes Henry's actions in reviewing her performance during this period as "undermining her authority by going behind her back and asking her employees' [sic] questions regarding Ms. Michael's performance." This conduct prompted Michael to file an additional complaint against Henry with the human resources department. Although many of Michael's concerns were substantiated, the company did not even mention these issues with Henry.

6. Caterpillar's reorganization and Michael's transfer

Michael successfully completed the performance plan in April of 2004. In June of 2004, Caterpillar reorganized its information technology (IT) department. As a result of the reorganization, Michael retained many of her duties, but was no longer responsible for IT asset management. This meant that she no longer supervised any subordinates. Her job title changed from Business and Asset Manager to Financial Analyst, but her salary and benefits remained the same.

Also in June of 2004, Henry contacted Michael to inform her that a manager at Caterpillar's facility in Griffin, Georgia had specifically asked about the possibility of Michael transferring there. Michael stated in her deposition that she was "surprised" and "happy" to receive this news. She accepted the offer and transferred to Georgia to become an engineering staff accountant with a 3% pay increase. Approximately one year later, Michael was promoted to the position of accounting supervisor. She now earns a significantly higher salary than she did in Nashville.

Michael asserts that the stress caused by the allegedly discriminatory employment situation in Nashville played a role in her subsequent breakup with her boyfriend, caused her to miscarry her child, and resulted in post-traumatic stress disorder. She also contends that, as a result of Caterpillar's actions, she has experienced sleepless nights, hair loss, weight loss, and a personality change.

SUMMARY OF REASONS FOR GRANTING THE WRIT

In this case, the Sixth Circuit's analysis of the facts and law of this case at the pretext stage violates the principles espoused in rule 56 of the Federal Rules of Evidence and in so doing denied Michael her right to a jury trial found in the Seventh Amendment to the United States Constitution. The Sixth Circuit Court of Appeals, unlawfully weighed the facts in the light most favorable to the Defendant, it found that certain facts that were necessary to support the prima facie case of discrimination were not relevant at the pretext stage, and it simply disregarded other facts that reasonable jurors may have believed called into serious question the believability of Caterpillar's legitimate non-discriminatory reason for its treatment of Michael.

Congress, in enacting the Civil Rights Act of 1991, mandated that Plaintiffs who bring cases for violation of Title VII were entitled to a trial by jury for those who sought compensatory as well as punitive damages. 42 U.S.C. § 1981 (a)(c)(1). In addition, as had been the case since the framing of the United States Constitution, congress recognized that "juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct. When the Act was amended to allow for compensatory as well as punitive damages, Seventh Amendment concerns were triggered. The Seventh Amendment provides that: [i]n suits at common law, where the value in controversy shall

exceed twenty dollars, *the right of trial by jury shall be preserved,* and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law." U.S. CONST Amend. VII. (emphasis added). Although the right to a trial by jury was guaranteed by congress to Plaintiffs who bring Title VII claims seeking money damages, the Courts, in contravention to statutory as well as constitutional rights are acting as jurors and deciding these cases at an alarming rate. This Court should exercise its supervisory function and grant Certiorari to review the facts and the Sixth Circuit's review of same in upholding the district court's grant of summary judgment.

In addition, the Sixth Circuit's analysis of the facts and law in this case conflicts with rulings of this Court. In 2000, this Court decided *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), which although it involved an age discrimination claim, provides guidance to the federal courts in reviewing a Rule 50 motion for judgment as a matter of law in discrimination cases.[3]

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[3] Although this case was decided based upon Rule 56 of the Federal Rules of civil Procedure, the standard upon which courts must not weigh the evidence at Rule 50 and 56 are substantially the same. At Rule 50 the Court must give the non moving party the benefit of all reasonable inferences to be drawn from the evidence. The Court cannot assess the weight of conflicting evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury. (citations omitted.) At Rule 56, "summary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party. " *Anderson, v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). Most important, "at the summary judgment stage the judge's

In Reeves, this Court reviewed the Fifth Circuit's grant of a Rule 50 motion in favor of the Defendant in an age discrimination case after appeal from an adverse judgment by jury verdict. This Court stated and/or reiterated a point made in *Hicks* that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148. Moreover, the Court made clear that there was no need to produce additional evidence of discrimination at the pretext stage, to offset the employer's legitimate-non discriminatory reason for its action, abrogating the outdated pretext plus standard.

Further, this Court in *Reeves* made it clear that "credibility determinations, the weighing of the evidence, and *the drawing of legitimate inferences from the facts are jury functions, not those of the judge.*" *Id.* at 150-51 (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986)). (emphasis added). Applying these standards, this Court found that the Fifth Circuit "impermissibly substituted its judgment concerning the weight of the evidence from the jury" and held that the Defendant was not entitled to JMOL. Likewise, various appellate courts have affirmed these principles espoused in *Reeves*, and have repeatedly held that the evidence should be viewed in the light most favorable to the non-movant, that all reasonable inferences are to be drawn in her favor, and that the judge is not to

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function is not to weight the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249.

weigh the evidence or assess witnesses' credibility. (citations omitted).

Notwithstanding the fact that Sixth Circuit correctly articulated the standard for review in this case as so stated in its opinion affirming the district court's grant of summary judgment, however, its application of the facts and the law so conflicts with this Court's prior precedence as to warrant the exercise of this Court's supervisory powers to review the decision made by the Sixth Circuit. Moreover, this Court should review the Sixth Circuit's decision because lower courts all over the nation have a propensity to dismiss Civil Rights cases prior to allowing a jury to review the evidence and this phenomenon runs afoul of Congressional intent and the Seventh Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. BECAUSE CONGRESS SPECIFICALLY CONFERRED THE RIGHT TO TRIAL BY JURY TO TITLE VII PLAINTIFFS AND BEAUSE THIS RIGHT IS PROTECTED BY THE SEVENTH AMENDMENT COURTS SHOULD NOT SUBSTUTITE ITS JUDGMENT FOR THAT OF THE JURY

The Court should grant the writ in order to preserve a plaintiff's right to trial by jury protected by Congressional authority as well as the Seventh Amendment to the United States Constitution. In 1991 Congress specifically amended the Civil Rights Act to allow for a jury trial. Congress recognized as had been the case for hundreds of years that juries are fully capable of determining whether an award of

damages is appropriate in civil cases. Indeed, Justice Scalia noted that "the people of the several states" were "so fearful" of "the practice of federal appellate reexamination of facts found by a jury ... that they constitutionally prohibited it by means of the seventh amendment." *Garperini v. Center for Humanties, Inc.*, 518 U.S. 415, 450 (1996).

Further, the right to jury trial can be traced back to the Magna Charta. See, Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639 (1973). The American colonist revered the right to a jury trial in both civil and criminal cases because of the fear of impartial judges. See, Stephen Landsman, The History and Objectives of the Civil Jury System, in Verdict: Assessing the Civil Jury System 33-34 (Robert E. Litan ed., 1993). As a result of this fear, the first congress passed the Federal Judiciary Act of 1789, which included a statutory right to a jury trial.[4] Five days later, the First Congress passed the Seventh Amendment.

The Seventh Amendment preserves the right to a jury trial in legal actions in federal court. The Supreme Court has based many of its decisions on the principle that the right to a jury trial is a "fundamental" constitutional right. See, e.g., *Jacob v. New York City*, 315 U.S. 752 (1942).

Since Congress specifically conferred upon Plaintiffs a right to trial by jury in Civil Rights cases and since

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[4] Ch. 20, 1 Stat. 73. The ninth, twelfth, and thirteen sections of this act provided that all issues of fact, except in cases of equity or admiralty and maritime jurisdiction, in the district courts, circuit courts, and Supreme Court shall be tried by jury. See §§ 9, 12, 13, 1 Stat. at 76, 79-81.

the framers to the United States Constitution guaranteed that right in the Seventh Amendment, courts should take that right away from Plaintiffs especially in Civil rights cases where this country was founded on the principle that all men are created equal. It is indeed a courts duty to protect the right to trial by jury. Accordingly, this Court should exercise its supervisory authority and review the facts and law in this case in order to preserve this sound and fundamental principle.

II. THE SIXTH CIRCUIT USURPED THE ROLE OF THE JURY BY SUBSTITING ITS JUDGMENT FROM THAT OF THE TRIER OF FACT IN AFFRIMING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT.

The Sixth Circuit analysis of the facts and the law in this case at the pretext stage, unconstitutionally usurped the role of the jury. The Court of appeals unlawfully found that certain facts that were necessary to support Michael's prima facie case of retaliation were not relevant at the pretext stage, disregarded other facts that reasonable jurors may have believed would call into serious question the believability of Caterpillar's alleged legitimate non-retaliatory reason for its treatment of Michael, and in so doing, weighed the facts in the light most favorable to the Defendant contrary to Rule 56 of the Federal Rules of Civil Procedure.

In *Reeves*, this Court granted certiorari

> [T]o resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination (as

> defined in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination.

Reeves, 530 U.S. at 140.

Justice O'Conner writing for a unanimous Court in *Reeves*, began the analysis by discussing the *McDonnell Douglas* framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1). *Id.* at 142. *McDonnell Douglas* and subsequent decisions have "established an allocation of the burden of production and an order for the presentation of proof in ... discriminatory-treatment cases." *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). The plaintiff must first establish a prima facie case of discrimination. *Ibid.; Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 252-253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). In the retaliatory context, the Sixth Circuit Court of Appeals has held that

> To establish a prima facie case of Title VII retaliation, the employee must show that (1) she engaged in activity protected by Title VII, (2) this exercise of protected rights was known to the employer; (3) the employer thereafter

> took adverse employment action against the employee, or the employee was subjected to severe or pervasive retaliatory harassment by a supervisor, and (4) there was a causal connection between the protected activity and the adverse employment action or harassment.

See, *Morris v. Oldham County Fiscal Court,* 201 F.3d 784, 792 (6th Cir.2000).

The Sixth Circuit concluded as it should have that Michael could state a prima facie case of retaliation. In so doing, the Sixth Circuit provided that since this Court's decision in *Burlington Northern and Santa Fe Railway Co. v. White,* 126 S.Ct. 2405, 2415, 165 L.Ed.2d 345 (2006) holding that a materially adverse employment action in the retaliation context consists of any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Sixth Circuit went on to say that

> This more liberal definition permits actions not materially adverse for purposes of an anti-discrimination claim to qualify as such in the retaliation context. *See, e.g., id.* at 2415-16 (noting that a supervisor's failure to invite an employee to lunch could, under certain circumstances, amount to materially adverse retaliation action); *Halfacre v. Home Depot, U.S.A., Inc.,* 221 Fed.Appx. 424, 432 (6th Cir.2007) (remanding for reconsideration, in light

> of *Burlington Northern,* whether assigning the plaintiff a poor performance evaluation score constituted an adverse employment action for the purpose of setting forth a retaliation claim). The retaliatory actions alleged by Michael, including her brief placement on paid administrative leave and the 90-day performance plan, appear to meet this relatively low bar.

Michael v. Caterpillar, 496 F.3d 584, 596 (6th Cir. 2007).

In further justification that Michael could make out a prima facie case of retaliation, the Sixth Circuit provided that as to the causal connection element

> This leaves only the requisite fourth and final element of a prima facie case-showing a causal connection. "To establish a causal connection, a plaintiff must proffer evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action." *Dixon v. Gonzales,* 481 F.3d 324, 333 (6th Cir.2007) (quotation marks omitted). "Although temporal proximity itself is insufficient to find a causal connection, a temporal connection coupled with other indicia of retaliatory conduct may be sufficient to support a finding of a causal connection." *Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 737 (6th

Cir.2006).

> [15] Michael's best argument for a causal connection between the adverse actions she alleged and the internal complaint she filed with Caterpillar's human resources department relies on (1) the two-day proximity between her initial complaint and Caterpillar's instigation of disciplinary action, (2) the fact that she had recently received a positive evaluation and an award indicating better-than-satisfactory job performance, (3) the fact that Henry, who also was the subject of a complaint, suffered no disciplinary action, and (4) Michael's claim that Caterpillar violated an internal company policy by taking disciplinary action against her without first providing her written notice of the underlying complaints. These facts, in our opinion, are sufficient to satisfy the final element of causation.

Michael, 496 F.3d at 596.

Although, the Sixth Circuit found that Michael could make out a prima facie case of retaliation, in holding that Michael could not show that Caterpillar's legitimate non retaliatory reason for its actions were pretext for discrimination, the Court of appeals, departed from accepted and usual course of judicial proceedings to call for an exercise of this Court's supervisory powers.

As Justice O'Conner made clear in *Reeves*,

> Although intermediate evidentiary burdens shift back and forth under this framework, [McDonald Douglas] "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine,* 450 U.S., at 253, 101 S.Ct. 1089. And in attempting to satisfy this burden, ***the plaintiff-once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision-must be afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."*** *Ibid.;* see also *St. Mary's Honor Center, supra,* at 507-508, 113 S.Ct. 2742. That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence." *Burdine, supra,* at 256, 101 S.Ct. 1089.

Reeves, 530 U.S. at 143. (emphasis added).

In this case it is clear that the Sixth Circuits *analysis of all the facts* at the pretext stage did anything but afford Michael an opportunity to prove by a preponderance of the evidence that the alleged legitimate reasons offered by Caterpillar were not its true reason but was a pretext for discrimination.

The Court simply reviewed the evidence in the light most favorable to Caterpillar.

First, the Sixth Circuit unlawfully usurped the role of the jury when in it found that Michael did not have sufficient evidence to rebut Caterpillar's legitimate nondiscriminatory reason that it placed Michael on paid administrative leave to ensure that Michael would not retaliate against Gooden for the complaint that he lodged against Michael. In reaching this conclusion, the court of appeals dismissed evidence of Michael's positive performance evaluation received just two weeks prior to the incidents giving rise to Michael's retaliation claim asserting that since the positive evaluation occurred prior to the investigation it was irrelevant. The Court of appeals did not address the fact that as part of the positive performance evaluation, Rezaii issued Michael an eye on quality award for "caring for others". Next, the court of appeals dismissed the evidence that Henry, Michael's manager was not placed on administrative leave because the nature of Gooden's complaint against Michael's was different than the complaint lodged by Michael against Henry. In order for the court of appeals to make this point, it unlawfully weighed the evidence of Michael's complaint and Gooden's complaint in the light most favorable to Caterpillar, which is solely the province of the jury.

Lastly, and most disturbing to Michael, is that fact that the court of appeals did not even mention at the pretext stage that Caterpillar violated its own internal policy by placing Michael on administrative leave. Caterpillar's Policy 701 provides that the process "should be approached as collaborative and

developmental rather punitive." Policy 701 also provides that "when meeting with an employee to discuss performance, managers behave in a way as to maintain the employee's dignity." Indeed, Step 1 of the process only provides for written documentation of any performance problems, unlike Step 2 and Step 3 which provides for termination after repeated performance failures.

Although the court of appeals had this information at its disposal, it did not include this evidence in its analysis at the pretext stage. Rather, it included facts in a light most favorable to Caterpillar.

More important, the court of appeals used the evidence that Caterpillar violated its own policy to properly find that Michael could meet the causal connection element, but stooped there and did not include this evidence as proof at the pretext stage. As Justice O'Conner made clear in *Reeves*, a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is sufficient to sustain a jury's finding of intentional discrimination. *Reeves*, 530 U.S. at 146. Moreover, in reaching that conclusion, the court provided that

> [I]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may,

> together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination."

In this case, had the court of appeals properly included the fact that Caterpillar violated its own policy in dealing with Michael, in addition to the facts that Michael just two weeks earlier received a positive performance evaluation that did not include any performance deficiencies, that Michael received an eye on quality award from Rezaii recognizing Michael for caring for others, responsibility, and exceeding expectations, reasonable jurors could disbelieve Caterpillar's legitimate non retaliatory reason and infer the ultimate issue of discrimination in this case.

As far as the 90 day performance plan, had Caterpillar followed Policy 701 correctly, Michael would not have been placed on the plan. Indeed, jurors may believe that Caterpillar reacted to Michael way too harsh by placing Michael on a performance plan for an alleged initial infraction of company policy. Based upon this evidence, Reasonable jurors could disbelieve Caterpillar's legitimate non retaliatory reason and infer the ultimate issue of discrimination in this case.

The Court of Appeals analysis of the facts at the pretext phase departs from this Courts pronouncement in Reeves that call for an exercise of the Court's supervisory powers. Thus, the resolution

of the issues raised in this Petition are likely to have ramifications far beyond the parties to this case or even Title VII litigants generally.

CONCLUSION

The Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the Sixth Circuit Court of Appeals in order to properly restore to Michael her right to trial by jury and to once and for all clarify once again the standard to establish proof of pretext.

Respectfully submitted,

Bradley W. Eskins

Counsel of Record
Bradley W. Eskins
50 North Front Street, Suite 770
Memphis, Tennessee 38103
(901) 578-6902

CASE NO. _____

In the
SUPREME COURT OF THE UNITED STATES

SHONTA MICHAEL,
Petitioner,

v.

CATERPILLAR FINANCIAL
SERVICES CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

APPENDIX "A'

ESKINS, KING & SEVIER, PC
Counsel of Record
Bradley W. Eskins
TN BPR NO. 19372
50 North Front Street, Suite 770
Memphis, Tennessee 38103
(901) 578-6902

United States District Court,M.D. Tennessee, Nashville Division.
ShontaMICHAEL, Plaintiff,
v.
CATERPILLAR FINANCIAL SERVICES CORPORATION, Defendant.
No. 3:05-CV-0177.

May 22, 2006.

Michael C. Skouteris, Skouteris Law Firm, Memphis, TN, for Plaintiff.
Jason M. Torres, Joseph S. Turner, Seyfarth Shaw, LLP, Chicago, IL, Lawrence Slade Eastwood, Jr., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Nashville, TN, for Defendant.

TRAUGER, J.
***1** Pending before the court is the Motion for Summary Judgment filed by the defendant, Caterpillar Financial Services Corporation (Docket No. 19), to which plaintiff ShontaMichael has responded (Docket No. 27), and the defendant has replied (Docket No. 29). For the reasons discussed herein, the defendant's motion will be granted.

FACTUAL BACKGROUND and PROCEDURAL HISTORY

ShontaMichael, the African-American plaintiff in this case, is currently employed as an Engineering Staff Accountant at the Griffin, Georgia facility of the defendant, Caterpillar Financial Services Corporation.[FN1] Prior to her transfer to this facility, the plaintiff worked initially as a Business and Asset Manager and, later, a Financial Analyst in the Information

Technology ("IT") Department at the defendant's Nashville, Tennessee, facility. (*See*Docket No. 21 at 9.) Before starting at the Nashville facility in September 2003, she held a variety of accounting-related positions at the defendant's Peoria, Illinois facility, where she began working in August 1997. All of the events giving rise to the plaintiff's claims took place at the defendant's Nashville facility, where she served as the "first black accounting manager in [the] company."(*See*Docket No. 13 ¶ 10.)

> FN1. Unless otherwise noted, all facts have been drawn from the plaintiff's Amended Complaint (Docket No. 13), her Memorandum in Opposition to the Defendant's Motion for Summary Judgment (Docket No. 27), and her Disputed Issues of Material Fact (Docket No. 28).

The plaintiff's job at the Nashville facility required her to supervise two of the defendant's employees, James Gooden (Caucasian) and Pam McGhee (African-American), as well as two contract employees. In turn, the plaintiff reported first to Holly Tomlinson (Caucasian) and then, following Tomlinson's transfer, to Patricia Henry (Caucasian). Diane Rezaii (Caucasian) served as Henry's direct supervisor.

The plaintiff's tenure under Tomlinson was characterized by an unblemished performance record. On January 8, 2004, the plaintiff received a very favorable performance evaluation, which noted that, among other things, she "ha[d] an excellent relationship with her staff," as well as "perfect attendance at weekly and monthly management meetings."(*See*Docket No. 13 ¶ 17.) This review was accompanied by an "Eye on Quality Award," which was given to the plaintiff by Rezaii and Tomlinson in return for the plaintiff's "care for others," "responsibility," and "exceeding expectations." (*See*Docket No. 13, Ex. B.) While the defendant claims that Tomlinson,

while discussing the plaintiff's performance evaluation with her, noted that the plaintiff "needed to do a better job of attending meetings on time," the plaintiff refutes this assertion. (*See*Docket No. 28 ¶ 31.)

The plaintiff bases her Amended Complaint on events that took place beginning on Thursday, January 15, 2004, the day that Henry officially replaced Tomlinson. The plaintiff, who was facing a year-end-report deadline of Friday, January 16, claims that she worked from home that Thursday evening and the following Friday during the day in order to complete the reports on time, which she did successfully. She asserts that she had implied authorization from Tomlinson to work from home but admits that she neither received explicit permission from Tomlinson nor told Henry that she would be away from the office. (*See*Docket No. 22, Ex. 3, Michael Dep. at 85-86.)

*2 The following Tuesday, January 20, Michael arrived late for a previously scheduled meeting in Henry's office. The plaintiff asserts that she was "approximately five minutes late" due to the fact that her previous meeting ran over, while the defendant claims that she was "at least fifteen minutes" tardy. (*See*Docket No. 29 ¶ 33, Docket No. 28 ¶ 56.) The plaintiff describes her meeting with Henry as peppered with Henry's "loud and angry outbursts," as well as her threatening accusations that the plaintiff's work was unsatisfactory. (*See*Docket No. 28 ¶ 35.) Following the meeting, the plaintiff filed with the "all-white" Human Resources Department ("Human Resources") a complaint outlining Henry's "discourteous and undignified manner." (*See id* . ¶ 39;Docket No. 13 ¶ 40.) Henry also immediately reported to Human Resources the plaintiff's alleged raised voice and refusal to answer questions during the meeting.

During this same time period, Gooden, one of the employees under the plaintiff's supervision, had complained to Rezaii that "he felt degraded by [the plaintiff] and very

uncomfortable working with her."(*See*Docket No. 28 ¶ 42.) Specifically, Gooden alleged that the plaintiff "made him perform personal tasks such as fetching water for [her] ..., retrieving her papers and faxes from the printer, and picking up her lunch from Captain D's restaurant."(*See id.; see also*Docket No. 22, Ex. 8, Gooden Dep. at 64.) The plaintiff denies these allegations. Rezaii and Henry relayed Gooden's complaints to Senior Human Resources Specialist Jackie Sweeney, who later interviewed each of the plaintiff's supervisees and, according to the defendant, received from many of them unfavorable reports about her workplace behavior.

On January 21, the plaintiff contacted Rezaii about Henry's behavior at their January 20 meeting. Rather than discussing Henry's behavior, however, Rezaii allegedly told the plaintiff that she was "under investigation" based on Gooden's allegations. (*See*Docket No. 13 ¶ 9.) It is undisputed, however, that Rezaii also told the plaintiff that she would report Henry's behavior to Human Resources. The following day, the plaintiff attended a meeting with Rezaii and Sweeney, during which they discussed the plaintiff's alleged performance problems, including her tardiness, her failure to meet deadlines, and her failure to follow instructions. At this meeting, Rezaii and Sweeney purportedly informed the plaintiff that, due to these problems, she could either accept a demotion or be terminated altogether.[FN2] At the conclusion of this meeting, Rezaii asked that the plaintiff turn in her company-issued laptop, take the following day off, and report back to work on Monday, January 26. The plaintiff alleges that, on Friday, January 23, Rezaii offered the plaintiff's position to Michelle Wilson, a Caucasian woman.

> FN2. According to Policy Number 701, the defendant's written policy regarding "less than satisfactory performance issues," an aggrieved

> manager faced with an under-performing employee first is to meet collaboratively with the employee in order to "mutually agree ... what actions will be taken to achieve satisfactory performance."(*See*Docket No. 27, Ex. 13 at 1 (describing "Step 1" of the plan).) The manager should then request the employee's signature as an acknowledgment of their discussion. Under "Step 2" of the plan, if the employee's performance has not improved following the parties' initial meeting, specific punitive actions can then be discussed. (*See id.* at 1-2.)

When the plaintiff arrived at work that Monday, however, she was offered two new options: 1) remain in her current position and be placed on a 90-day performance plan, as required under the defendant's written policy for under-performing employees (*see*Docket No. 27, Ex. 13 at 1 (describing "Step 1" of Policy Number 701)); or 2) accept a lateral transfer to a position under a different supervisor. Although she disputed the need for such action, the plaintiff chose the former option and successfully completed the performance plan, which specified seven areas of required improvement and required the plaintiff to meet with Henry on a regular basis. The plaintiff alleges that, during this probationary period, "Henry would constantly demean and embarrass [her] in the presence of [the plaintiff's] staff by openly criticizing her abilities in a disparaging manner."(*See*Docket No. 13 ¶ 65.) The plaintiff admits that she retained her job title and responsibilities during this period and acknowledges that she received a merit increase in April 2004. The probationary period concluded on April 29, 2004.

*3 In June 2004, as a result of a reorganization of the IT Department, the plaintiff was transferred to a non-supervisory Financial Analyst position. The plaintiff retained the same salary grade, compensation, incentive

compensation, and chain-of-command in her new position as she had in her old one. Following her reassignment, the plaintiff filed another complaint with Human Resources.

Also in June 2004, Henry contacted the plaintiff about an accounting position in Griffin, Georgia that had become open. The plaintiff admits that she was "surprised" and "happy" to learn of this new position, as her nine-year relationship with a man in the Nashville area had recently come to an end. (*See*Docket No. 28 ¶ ¶ 113-14.) The plaintiff began training for her new position in July 2004 and officially began work as an Engineering Staff Accountant in Griffin soon afterward. The plaintiff's new position afforded her a three-percent increase in salary, as well as "significant incentive compensation." (*See id.* ¶ 118.)In April 2005, the plaintiff was promoted. She now earns significantly more money than she did while working in Nashville.

The plaintiff filed charges with the Equal Employment Opportunity Commission ("EEOC") on January 23, 2004, alleging that the defendant had discriminated against her based on her race. In September 2004, the EEOC mailed to the plaintiff a Notice of Determination, which stated that "based on information discovered during [its] investigation [of the defendant], there is evidence that a racially hostile work environment exists for Black employees. Evidence shows that [the plaintiff] was treated less favorably than other managers with allegations of subordinate complaints against them."(*See*Docket No. 27, Ex. 14 at 1.) Following the EEOC's failed attempts to achieve conciliation between the plaintiff and the defendant, it mailed to the plaintiff on December 10, 2004, her Notice of Right to Sue. (*See*Docket No. 13, Ex. A.) The plaintiff filed suit in this court on March 7, 2005. (*See*Docket No. 1.)

The plaintiff charges the defendant with racial discrimination, retaliation, and the creation of a hostile work environment. (*See*Docket No. 13 at 15-17.)The defendant has moved for summary judgement on each of the plaintiff's claims, which she brings pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S .C. § 2000e-2(a)(1) (2000), § 1981 of the Civil Rights Act of 1991, 42 U.S.C. § 1981, and the Tennessee Human Rights Act ("THRA"), Tenn.Code. Ann. § 4-21-101, *et seq.* (2005).

I. Relevant Standards

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."Fed.R.Civ.P. 56(c). To prevail, the moving party must meet the burden of proving the absence of a genuine issue of material fact as to an essential element of the opposing party's claim. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Logan v. Denny's, Inc.*, 259 F.3d 558, 566 (6th Cir.2001).

*4 In determining whether the moving party has met its burden, the court must view the factual evidence and draw all reasonable inferences in the light most favorable to the nonmoving party. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir.2000)."The court's function is not to weigh the evidence and determine the truth of the matters asserted, 'but to determine whether there is a genuine issue for trial." ' *Little Caesar Enters., Inc. v. OPPCO, LLC,* 219

F.3d 547, 551 (6th Cir.2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

If the nonmoving party fails to make a sufficient showing on an essential element of the case with respect to which she has the burden, however, the moving party is entitled to summary judgment as a matter of law. *See Williams v. Ford Motor Co.*, 187 F.3d 533, 537-38 (6th Cir.1999). To preclude summary judgment, the nonmoving party "must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial."*Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir.2002)."The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]."*Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 566 (6th Cir.2003) (quoting *Anderson*, 477 U.S. at 252). If the evidence offered by the nonmoving party is "merely colorable," or "not significantly probative," or not enough to lead a fair-minded jury to find for the nonmoving party, the motion for summary judgment should be granted. *Anderson*, 477 U.S. at 249-52. "A genuine dispute between the parties on an issue of material fact must exist to render summary judgment inappropriate."*Hill v. White*, 190 F.3d 427, 430 (6th Cir.1999) (citing *Anderson*, 477 U.S. at 247-49).

Although the plaintiff asserts her claims under three different statutes, both § 1981 and the THRA track traditional Title VII burden-shifting analysis. *See Newman v. Fed. Express Corp.*, 266 F.3d 401, 406 (6th Cir.2001); *Wade v. Knoxville Utilities Bd.*, 259 F.3d 454, 464 (6th Cir.2001); *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 31 (Tenn.1996). Accordingly, the following Title VII analysis applies to each of the plaintiff's causes of action.

II. The defendant is entitled to judgment as a matter of law on the plaintiff's claims of racial discrimination and retaliation.

In analyzing the plaintiff's allegations of discrimination and retaliation, [FN3] the court must employ the *McDonnell Douglas* approach, which first requires a plaintiff to establish a *prima facie* case for each of her claims. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Abbott v. Crown Motor Co.,* 348 F.3d 537, 542 (6th Cir.2003) (retaliation); *Clayton v. Meijer, Inc.,* 281 F.3d 605, 610 (6th Cir.2002) (citing *Talley v. Bravo Pitino Rest., Ltd.,* 61 F.3d 1241, 1246-47 (6th Cir.1995)) (discrimination).

> FN3. The defendant claims that § 1981 does not allow for retaliation-based causes of action. (*See*Docket No. 21 at 13 n. 6 .) The Sixth Circuit, however, has explicitly recognized such claims as viable. *See Wade v. Knoxville Utils.Bd.,* 259 F.3d 452, 464 (6th Cir.2001).

*5 Once a plaintiff makes out a *prima facie* case on either claim, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action, after which the plaintiff must demonstrate that the proffered reason was a mere pretext for what was actually an improper motive. *See Abbott,* 348 F.3d at 542;*Williams v. Nashville Network,* 132 F.3d 1123, 1131 (6th Cir.1997).

To establish a *prima facie* case of race discrimination under Title VII, a plaintiff must demonstrate that (1) she is a member of a protected class; (2) she suffered an adverse action; (3) she was qualified for the position; and (4) she was replaced by someone outside the protected class or was treated differently from similarly situated non-protected

employees. *Warfield v. Lebanon Corr. Inst.*, 181 F.3d 723, 729 (6th Cir.1999). In order to establish a *prima facie* case of retaliation under this same framework, a plaintiff must demonstrate the following: (1) she engaged in activity protected by Title VII; (2) her exercise of such protected activity was known by the defendant; (3) thereafter, the defendant took an employment action adverse to her; and (4) a causal connection existed between the protected activity and the adverse employment action. *Abbott v. Crown Motor Co.*, 348 F.3d 537, 542 (6th Cir.2003); *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 860 (6th Cir.1997). The burden of establishing a *prima facie* case in a retaliation action is not onerous, but easily met. *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir.2000).

Even given her relatively light burden at the *prima facie* level, the plaintiff has failed to demonstrate that she suffered any adverse action at the hands of the defendant. In order to establish that she was subjected to an adverse employment action, a plaintiff must show "termination of employment, a demotion evidenced by a decrease in salary or wage, a less distinguished title, a material loss of benefits, or other indices that might be unique to a particular situation."*Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir.1996) (citing *Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir.1993)). Thus far, the Sixth Circuit has not specified what such "indices" might include. *Richmond-Hopes v. City of Cleveland*, No. 97-3595, 1998 WL 808222, at *8 (6th Cir. Nov.16, 1998) (unpublished). It has indicated, however, that "a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities."*Hollins*, 188 F.3d at 662. Additionally, it recently noted that a mere "bruised ego" is not enough to constitute an adverse employment action. *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 797 (6th Cir.2004).

The plaintiff principally argues that the defendant took an adverse action against her when it subjected her to race-based harassment that amounted to a hostile work environment. Because, as explained below, *see infra* Part III, no genuine issue of material fact exists as to whether the plaintiff was subjected to race-based harassment, any discussion of whether such harassment may qualify as an adverse action for the purposes of *prima facie* discrimination and retaliation analysis would be inapposite.

*6 Because the plaintiff refers to a number of the defendant's actions that arguably could be considered adverse, this court will explain briefly why none of them qualifies as such. First, the defendant complains that she was placed on a 90-day performance plan based on her employee, James Gooden's, complaints about her, while her supervisor, Patricia Henry, met no consequences despite the plaintiff's complaints about her. An employer's requirement that an employee comply with a performance plan does not qualify as an adverse action. *See Miceli v. U.S. Dep't of Transp.*, 83 Fed. App'x 697, 700 (6th Cir.2003); *Agnew v. BASF Corp.*, 286 F.3d 307, 310 (6th Cir.2002). Accordingly, even if the imposition of the performance plan was unfair, as the plaintiff alleges it was, the plaintiff was not subjected to an adverse employment action that Henry avoided.[FN4]

FN4. In addition, it is not the court's place to second-guess the defendant's business practices in not investigating Henry, absent some proof, which is not evident here, that this failure to investigate her was illegal. *See Smith v. Leggett Wire Co.*, 220 F.3d 752, 763 (6th Cir.2000) (finding that "it is inappropriate for the judiciary to substitute its judgment for that of management"); *see also White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 246 (6th Cir.2005) (finding that "an employer's failure to follow self-

> imposed regulations or procedures is generally insufficient to support a finding of pretext").

Next, the plaintiff appears to allege that her transfer within the Nashville facility from the Business and Asset Manager position to a Financial Analyst position qualifies as an adverse action. Because the plaintiff retained the same salary grade, compensation, incentive compensation, and chain-of-command in her new position as she had in her old one, this lateral transfer does not qualify as an adverse action. *See Hollins,* 188 F.3d at 662;*Kocsis v. Multicare Mgmt.,* 97 F.3d 876, 885 (6th Cir.1996). While she did lose supervisory authority over two employees, the plaintiff has not demonstrated that this qualifies as anything other than a mere alteration of job responsibilities. *See id.; see also Bialczak v. Ohio Dep't of Taxation,* No. 99-3841, 2000 WL 1888789, at *2 (6th Cir.2000) (unpublished) (finding that an employer's reduction of an employee's supervisory authority as part of an internal reorganization did not qualify as an adverse action).

Finally, the plaintiff claims that she was transferred to the defendant's Griffin, Georgia facility in retaliation for her complaints of race discrimination. The plaintiff admits, however, that she was "surprised" and "happy" to learn of this new position, as her nine-year relationship with a man in the Nashville area had recently come to an end. (*See*Docket No. 28 ¶ ¶ 113-14.) She also acknowledges that her transfer to the Griffin facility was voluntary. (*See id.* ¶ 117.)Voluntary, lateral transfers do not qualify as adverse actions. *See Hollins,* 188 F.3d at 662;*Kocsis,* 97 F.3d at 885.

Accordingly, because the plaintiff has not demonstrated that she suffered any adverse action at the hands of the defendant, she has failed to meet her burden of establishing a *prima facie* case of racial discrimination or retaliation. As such, the defendant is entitled to judgment as a matter of law on both claims.

III. No genuine issue of material fact exists as to whether the defendant subjected the plaintiff to a hostile work environment.

A hostile working environment occurs "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."*Bowman v. Shawnee State Univ.*, 220 F.3d 456, 463 (6th Cir.2000) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)). In order to make out such a claim, a plaintiff must demonstrate the following: (1) she was a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment complained of was based on race; (4) the harassment created a hostile working environment; and (5) her employer has *respondeat superior* liability. *See Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1078-79 (6th Cir.1999); *Williams v. General Motors Corp.*, 187 F.3d 553, 560-61 (6th Cir.1999). Where an employee claims harassment by a superior, as does the plaintiff in this case, she may demonstrate the *respondeat superior* prong of her claim by showing that her employer failed to take reasonable care to prevent and correct any harassing behavior, thus rendering it liable for the harassment she experienced. *Hafford v. Seidner*, 183 F.3d 506, 512-13 (6th Cir.1999).

*7 Here, the plaintiff alleges that the actions of some of the defendant's employees were of such a harassing nature that they constituted a hostile work environment. Specifically, she alleges that Diane Rezaii and Jackie Sweeney unfairly sent her home, took away her laptop computer, and threatened to terminate her following complaints made against her by James Gooden. In addition, she claims that her managers

harassed her by baselessly placing her on the 90-day performance plan, which required her to meet with Patricia Henry, her direct supervisor, on a regular basis. She also asserts that Henry "[went] behind [her] back and question[ed][her] subordinate employees about what [she] was or was not doing, thereby undermining [her] management authority."(*See*Docket No. 27 at 16.)Finally, she claims that the management's failure to investigate complaints that she lodged against Henry contributed to the formation of a hostile work environment. In response to this last allegation, the defendant asserts that Rezaii told the plaintiff that the plaintiff's complaint would be investigated, but the plaintiff argues that "no one from Human Resources ever followed up with [her] regarding her complaints of discrimination against ... Henry."(*See*Docket No. 28 ¶ 73.)

Most of the actions of which the plaintiff has complained involve steps taken against her following Gooden's complaints about her supervisory abilities. The plaintiff has not demonstrated that such steps were taken for any reason other than because one of her employees lodged a complaint against her, which was then substantiated by further investigation. (*See id.*("Rezaii ... explained that she received complaints about [the plaintiff's] management style and that the HR department was investigating those complaints ... Undisputed.").) No evidence has been cited to demonstrate that the plaintiff's managers were instead acting in furtherance of some sort of discriminatory motive. If any of the actions listed by the plaintiff do qualify as race-based, however, it is only the latter one, in which the defendant arguably neglected to investigate the plaintiff's complaints about Henry, her Caucasian supervisor.

In order to demonstrate that she was subjected to a hostile working environment, a plaintiff must meet both an objective and a subjective test. She must show that the conduct about which she is complaining was severe or pervasive enough to

create an environment that a reasonable person would find hostile or abusive and that, in addition, she subjectively regarded that environment as abusive. *Bowman,* 220 F.3d at 463 (citing *Harris,* 510 U.S. at 21-22).

A court tasked with deciding if a working environment is objectively hostile or abusive must evaluate the totality of the circumstances presented to it.*Williams,* 187 F.3d at 562. "[T]he issue is not whether each incident of harassment standing alone is sufficient to sustain the cause of action in a hostile environment case, but whether-taken together-the reported incidents make out such a case."*Id.* In making such a determination, a court may consider a number of factors, including but not limited to the following: "the frequency of discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."*Harris,* 510 U.S. at 23. The Supreme Court has noted that, in conducting this analysis, "no single factor is required" in order to determine that an employee's working environment was objectively hostile or abusive. *Id.*

***8** The Supreme Court has cautioned courts against overreaching the bounds of Title VII's prohibitions and allowing it to become a "general civility code." *Faragher v. City of Boca Raton,* 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). It has emphasized that "properly applied, [Title VII standards] will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language ... and occasional teasing."*Id.* (internal citations omitted); *see also Hafford,* 183 F.3d at 512-13 (" 'A recurring point' in the Supreme Court opinions is that 'simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." ' (quoting *Faragher,* 524 U.S. at 788)).

Even if the failure of the defendant to investigate the plaintiff's complaints against Henry was race-based, it does not demonstrate that the plaintiff was subjected to an objectively hostile work environment. Simply put, no genuine issue of material fact exists as to whether this alleged, one-time failure was so severe that it altered the terms and conditions of the plaintiff's employment. *See Bowman,* 220 F.3d at 463. In addition, the defendant's purported neglect to investigate Henry does not appear to have interfered with the plaintiff's performance at work, as she successfully completed the 90-day performance plan and even received a merit-based raise during that time. Accordingly, because the plaintiff has not presented evidence that would allow a reasonable jury to find that the defendant subjected her to an objectively hostile work environment, her assertions to this end must fail.

The plaintiff has not demonstrated that a genuine issue of material fact exists as to whether the defendant subjected her to an adverse action for the purposes of her racial discrimination or retaliation claims. In addition, she has failed to offer evidence that would allow a reasonable jury to conclude that she has been subjected to a hostile working environment based on racial harassment. Thus, the defendant's motion for summary judgment on all claims will be granted, and this case will be dismissed.

An appropriate order will enter.

M.D.Tenn.,2006.
Michael v. Caterpillar Financial Services Corp.
Slip Copy, 2006 WL 1454734 (M.D.Tenn.)

United States Court of Appeals,Sixth Circuit.
Shonta MICHAEL, Plaintiff-Appellant,
v.
CATERPILLAR FINANCIAL SERVICES CORPORATION, Defendant-Appellee.
No. 06-5750.

Argued: June 7, 2007.
Decided and Filed: July 31, 2007.

Background: Female African-American employee brought action against employer, alleging race discrimination, retaliation, and hostile work environment claims, under Title VII, § 1981, and the Tennessee Human Rights Act (THRA). The United States District Court for the Middle District of Tennessee, 2006 WL 1454734,Aleta A. Trauger, J., granted summary judgment in favor of employer. Employee appealed.

Holdings: The Court of Appeals, Ronald Lee Gilman, Circuit Judge, held that:

(1) confrontation between employee and her supervisor, requirement that employee turn in her laptop computer, and employee's brief placement on paid administrative leave were not "adverse employment actions" for purpose of discrimination claim;

(2) placement on administrative leave and 90-day performance plan were "adverse employment actions," for purpose of retaliation claim;

(3) causal connection was established for purpose of prima facie retaliation claim;

(4) proffered legitimate reason for placing employee on administrative leave was not pretext for retaliation;

(5) proffered legitimate reason for placing employee on 90-day performance plan was not pretext for retaliation or discrimination; and

(6) treatment of employee was insufficient to establish hostile work environment claim.

Affirmed.

West Headnotes

[1] Federal Civil Procedure 170A ⚿2465.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)1 In General
170Ak2465 Matters Affecting Right to Judgment
170Ak2465.1 k. In General. Most Cited Cases

Federal Civil Procedure 170A ⚿2470.4

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)1 In General
170Ak2465 Matters Affecting Right to Judgment
170Ak2470.4 k. Right to Judgment as Matter of Law. Most Cited Cases

In deciding a motion for summary judgment, the central issue is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Fed.Rules

Civ.Proc.Rule 56(c), 28 U.S.C.A.

[2] Civil Rights 78 ⚿1536

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1534 Presumptions, Inferences, and Burden of Proof
78k1536 k. Effect of Prima Facie Case; Shifting Burden. Most Cited Cases
The employee bears the initial burden under the *McDonnell Douglas* framework of demonstrating the prima facie elements of her Title VII claim. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[3] Civil Rights 78 ⚿1536

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1534 Presumptions, Inferences, and Burden of Proof
78k1536 k. Effect of Prima Facie Case; Shifting Burden. Most Cited Cases
Under the *McDonnell Douglas* burden-shifting framework, if the employee succeeds in demonstrating a prima facie claim under Title VII, this creates a rebuttable presumption of discrimination, and the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for taking the challenged employment action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[4] Civil Rights 78 ⚿1536

78 Civil Rights
78IV Remedies Under Federal Employment

Discrimination Statutes

78k1534 Presumptions, Inferences, and Burden of Proof

78k1536 k. Effect of Prima Facie Case; Shifting Burden. Most Cited Cases

Under the *McDonnell Douglas* burden-shifting framework, only if the employer articulates a legitimate, nondiscriminatory reason for taking the challenged employment action, in a Title VII action, does the burden shift back to the employer to then prove that the proffered reason was actually a pretext to hide unlawful discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[5] Civil Rights 78 ⚿1118

78 Civil Rights

78II Employment Practices

78k1118 k. Practices Prohibited or Required in General; Elements. Most Cited Cases

In order to establish a prima facie case of employment discrimination under Title VII, the employee must show that she (1) is a member of a protected group, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) was replaced by a person outside of the protected class or was treated differently from similarly situated members of the unprotected class. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[6] Civil Rights 78 ⚿1119

78 Civil Rights

78II Employment Practices

78k1119 k. Adverse Actions in General. Most Cited Cases

An "adverse employment action" in the context of a Title VII employment discrimination claim is a materially adverse

change in the terms or conditions of employment because of the employer's actions. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[7] Civil Rights 78 ⚿1119

78 Civil Rights
78II Employment Practices
78k1119 k. Adverse Actions in General. Most Cited Cases
A materially adverse change in the terms and conditions of employment, as required to establish a prima facie discrimination claim under Title VII, must be more disruptive than a mere inconvenience or an alteration of job responsibilities. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[8] Civil Rights 78 ⚿1119

78 Civil Rights
78II Employment Practices
78k1119 k. Adverse Actions in General. Most Cited Cases
A materially adverse change in employment, as required to establish a prima facie Title VII discrimination claim, might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. Civil Rights Act of 1964, § 701, 42 U.S.C.A. § 2000e.

[9] Civil Rights 78 ⚿1120

78 Civil Rights
78II Employment Practices
78k1120 k. Particular Cases. Most Cited Cases

Neither the confrontation between African-American employee and her supervisor, in which harsh words were exchanged, nor the requirement that employee turn in her laptop computer, nor the employee's brief placement on paid administrative leave constituted "adverse employment actions," for purpose of establishing prima facie Title VII race discrimination claim; none of these actions resulted in a material alteration to conditions of employment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[10] Civil Rights 78 ⚿1243

78 Civil Rights
78II Employment Practices
78k1241 Retaliation for Exercise of Rights
78k1243 k. Practices Prohibited or Required in General; Elements. Most Cited Cases
To establish a prima facie case of Title VII retaliation, the employee must show that (1) she engaged in activity protected by Title VII, (2) this exercise of protected rights was known to the employer; (3) the employer thereafter took adverse employment action against the employee, or the employee was subjected to severe or pervasive retaliatory harassment by a supervisor, and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[11] Civil Rights 78 ⚿1245

78 Civil Rights
78II Employment Practices
78k1241 Retaliation for Exercise of Rights
78k1245 k. Adverse Actions in General. Most Cited Cases
A materially "adverse employment action" in the Title VII retaliation context consists of any action that well might have

dissuaded a reasonable worker from making or supporting a charge of discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[12] Civil Rights 78 ⚿1248

78 Civil Rights
78II Employment Practices
78k1241 Retaliation for Exercise of Rights
78k1248 k. Discipline. Most Cited Cases
Brief placement of African-American employee on paid administrative leave and her placement on a 90-day performance plan constituted "adverse employment actions," for purpose of Title VII retaliation claim; such disciplinary actions could have dissuaded a reasonable worker from making complaints of discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[13] Civil Rights 78 ⚿1252

78 Civil Rights
78II Employment Practices
78k1241 Retaliation for Exercise of Rights
78k1252 k. Causal Connection; Temporal Proximity. Most Cited Cases
To establish a causal connection, for purpose of Title VII retaliation claim, the employee must proffer evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[14] Civil Rights 78 ⚿1252

78 Civil Rights
78II Employment Practices
78k1241 Retaliation for Exercise of Rights
78k1252 k. Causal Connection; Temporal

Proximity. Most Cited Cases
Although temporal proximity itself is insufficient to find a causal connection, for purpose of a Title VII retaliation claim, a temporal connection coupled with other indicia of retaliatory conduct may be sufficient to support a finding of a causal connection. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[15] Civil Rights 78 ⚿1252

78 Civil Rights
78II Employment Practices
78k1241 Retaliation for Exercise of Rights
78k1252 k. Causal Connection; Temporal Proximity. Most Cited Cases
Causal connection was established between African-American employee's complaints of racial discrimination to human resources and her subsequent placement on paid administrative leave and on a 90-day performance plan, for purpose of establishing prima facie Title VII retaliation claim; disciplinary action was instigated against employee only two days after her initial complaint, she received a fairly positive evaluation and performance award, supervisor, who was subject of complaint, suffered no disciplinary action, and employer allegedly violated its own policy by taking disciplinary action against her without first providing written notice of the underlying complaints. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[16] Civil Rights 78 ⚿1251

78 Civil Rights
78II Employment Practices
78k1241 Retaliation for Exercise of Rights
78k1251 k. Motive or Intent; Pretext. Most Cited Cases
Employer's proffered non-retaliatory reason for placing

African-American employee on two-day paid administrative leave, that the action was necessary due to pending investigation of complaints by both employee's subordinate and supervisor about employee's professionalism, was not pretext for retaliation, as required to establish Title VII retaliation claim; the complaints against employee were serious, including that she worked from home without permission, that she managed her subordinates in a degrading manner by calling them at odd hours and having them perform personal tasks, that she showed up late for meetings, and that she acted insubordinately at a meeting with her supervisor, and some of the complaints had already been substantiated by human resources at the time of the leave. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[17] Civil Rights 78 ⚿1137

78 Civil Rights
78II Employment Practices
78k1137 k. Motive or Intent; Pretext. Most Cited Cases

Civil Rights 78 ⚿1251

78 Civil Rights
78II Employment Practices
78k1241 Retaliation for Exercise of Rights
78k1251 k. Motive or Intent; Pretext. Most Cited Cases

An employee can demonstrate pretext, for purpose of Title VII discrimination and retaliation claims, by showing that the legitimate, non-discriminatory reason given by employer for the adverse employment action (1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. §

2000e et seq.

[18] Civil Rights 78 ⚿1137

78 Civil Rights
78II Employment Practices
78k1137 k. Motive or Intent; Pretext. Most Cited Cases

Civil Rights 78 ⚿1251

78 Civil Rights
78II Employment Practices
78k1241 Retaliation for Exercise of Rights
78k1251 k. Motive or Intent; Pretext. Most Cited Cases
Employer's proffered legitimate reason for placing African-American employee on 90-day performance plan, that complaints about employee's tardiness and lack of professionalism by coworkers and supervisors had been substantiated by human resources investigation, was not pretext for retaliation or race discrimination, as required to establish retaliation and discrimination claims under Title VII; employer had honest and reasonable belief that employee's performance needed monitoring based on human resources investigation. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[19] Federal Civil Procedure 170A ⚿2545

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2545 k. Admissibility. Most Cited Cases

Hearsay witness statements contained in an investigative report may be considered on summary judgment, for purpose of a Title VII claim, not to prove their truth, but to demonstrate the state of mind and motive of employer's managers in taking adverse employment actions against employee. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[20] Civil Rights 78 ⚿1137

78 Civil Rights
78II Employment Practices
78k1137 k. Motive or Intent; Pretext. Most Cited Cases
The key inquiry in assessing whether an employer holds an honest belief in its proffered non-discriminatory reason for the adverse employment action is whether the employer made a reasonably informed and considered decision before taking the complained-of action, for purpose of Title VII employment discrimination action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[21] Civil Rights 78 ⚿1147

78 Civil Rights
78II Employment Practices
78k1143 Harassment; Work Environment
78k1147 k. Hostile Environment; Severity, Pervasiveness, and Frequency. Most Cited Cases

Civil Rights 78 ⚿1185

78 Civil Rights
78II Employment Practices
78k1181 Sexual Harassment; Work Environment
78k1185 k. Hostile Environment; Severity, Pervasiveness, and Frequency. Most Cited Cases

To establish a hostile-work-environment claim under Title VII, an employee must show that (1) she was a member of a protected group, (2) she was subjected to unwelcome harassment, (3) the harassment was based upon the employee's protected status, such as race or gender, (4) the harassment affected a term, condition, or privilege of employment, and (5) the employer knew or should have known about the harassing conduct but failed to take any corrective or preventive actions. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[22] Civil Rights 78 ⚿1147

78 Civil Rights
78II Employment Practices
78k1143 Harassment; Work Environment
78k1147 k. Hostile Environment; Severity, Pervasiveness, and Frequency. Most Cited Cases
Actionable harassment arises under Title VII where the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[23] Civil Rights 78 ⚿1147

78 Civil Rights
78II Employment Practices
78k1143 Harassment; Work Environment
78k1147 k. Hostile Environment; Severity, Pervasiveness, and Frequency. Most Cited Cases
A Title VII hostile-work-environment claim is cognizable only if the purported harassment, viewed in conjunction with all of the circumstances, occurred because of the employee's protected status. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[24] Civil Rights 78 ⚿1147

78 Civil Rights
78II Employment Practices
78k1143 Harassment; Work Environment
78k1147 k. Hostile Environment; Severity, Pervasiveness, and Frequency. Most Cited Cases
Employer's treatment of African-American employee did not amount to severe or pervasive racial harassment, and thus, was insufficient to demonstrate a hostile work environment claim under Title VII; although employee was placed on two-day administrative leave pending investigation of complaints against her, was placed on 90-day performance plan, and was allegedly shouted at by her supervisor during a meeting, the employer demonstrated an honest belief that the leave and performance plan were necessary to address complaints against employee, even if shouting by supervisor occurred, such conduct was not severe or pervasive, and there was no showing that coworkers or supervisor ever made overtly racist remarks or threats toward employee. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

***588 ARGUED:** Bradley W. Eskins, Eskins King, Memphis, Tennessee, for Appellant. Joseph S. Turner, Seyfarth Shaw LLP, Chicago, Illinois, for Appellee. **ON BRIEF:** Michael C. Skouteris, Skouteris & Magee, PLLC, Memphis, Tennessee, for Appellant. Joseph S. Turner, Jason M. Torres, Seyfarth Shaw LLP, Chicago, Illinois, for Appellee.

Before: CLAY, GILMAN, and McKEAGUE, Circuit Judges.

RONALD LEE GILMAN, Circuit Judge.
Shonta Michael, an African-American employee of

Caterpillar Financial Services Corporation, filed this employment-related action arising out of a disciplinary episode that began in late January of 2004. At that time, Caterpillar management placed Michael on a 90-day performance plan in response to various complaints lodged against her. Michael alleges that Caterpillar (1) discriminated against her by taking disciplinary action based on unfounded complaints, (2) retaliated against her for raising complaints of her own, and (3) created a racially hostile work environment. The district court granted summary judgment in favor of Caterpillar regarding all of Michael's claims. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

A. Factual background

This case arises primarily from a conflict that Michael experienced with a manager at Caterpillar named Patricia Henry, who had recently replaced Michael's prior manager, Holly Tomlinson. Henry and Caterpillar insist that the conflict and subsequent disciplinary measures came about solely because of issues with Michael's performance, whereas Michael asserts that Caterpillar engaged in race-based discrimination, retaliation, and harassment.

Michael began working for Caterpillar in August of 1997, just after graduating from college. In September of 2003, she accepted a transfer from Caterpillar's Peoria, Illinois office to its Nashville, Tennessee facility to become an asset manager in the accounting department. Her new position required her to supervise two other employees: James Gooden, a Caucasian, and Pam McGhee, an African-American. Adrena Holland, an African-American, later replaced McGhee as a temporary employee during McGhee's

maternity leave. *589 Similarly, Tomlinson initially served as Michael's immediate supervisor, but she was subsequently replaced by Henry, another cost-accounting manager, effective January 13, 2004. Both Tomlinson and Henry reported directly to Financial Accounting Manager Diane Rezaii. Tomlinson, Henry, and Rezaii are all Caucasian.

On or around December 13, 2003, Rezaii held a meeting with Henry, Tomlinson, and Michael to discuss the status of work in the accounting department. Rezaii claims that Michael arrived late to this meeting; Michael responds by saying only that she cannot recall the meeting.

1. Michael's performance evaluation

On January 8, 2004, Michael met with Tomlinson to review a written performance evaluation of Michael. The evaluation generally rated her quite favorably. It noted that "[s]he seems to have a good report [sic] with her staff," but also listed "developing others" and "managing performance" as an "opportunity for development" rather than a "strength." At the same meeting, Michael received an "Eye on Quality Award" worth $50 that recognized her for excelling in "customer service" and for the qualities of "responsibility," "care for others," and "exceeding expectations." Although Tomlinson asserts that she informed Michael during the meeting that she needed to do a better job of attending meetings on time, Michael disputes that this occurred.

Following this performance review, a second meeting among Michael, Henry, and Rezaii was held on January 14, 2004. Both Henry and Rezaii claim that Michael was again late to the meeting, but this is disputed by Michael.

2. Michael's absence and Gooden's complaint, both on January 16

Michael admits that on January 16, 2004 she worked from home rather than coming in to her office in Nashville. She had allegedly worked late the previous night and then woke up early the next morning, all in order to complete a time-sensitive year-end report that she had been assigned to produce. According to Michael, Tomlinson had implicitly authorized her to work from home by stating the she should "do what she had to do" to complete the report. Michael conceded in her deposition, however, that Tomlinson had not specifically authorized her to work from home that day, saying that "[s]he never gave me direct authorization, not in those words."

During the course of that day, Michael's online calendar listed her as "busy." She responded to emails from Henry, but did not disclose that she was working from home. According to Michael, she began working from home early in the morning, and continued working and sending emails until 2:00 or 3:00 p.m. After realizing at some point during the day that Michael was not in the office, Henry contacted Tomlinson to ask whether she had given Michael permission to work from home. Tomlinson informed Henry that she had not given Michael such authorization.

Also on January 16, 2004, Gooden, one of Michael's subordinates, complained about Michael's management style to Rezaii. According to Rezaii, Gooden asserted that he felt degraded by Michael because she would make him perform personal errands such as bringing her water, retrieving paper off the printer, or picking up lunch for Michael at Captain D's restaurant. Michael disputes the substance of the allegations, but she does not contest the fact that Gooden indeed lodged a complaint. Gooden also complained to Rezaii that Michael made a practice of calling McGhee and Holland, Michael's other two subordinates, at home-sometimes as early as 5:00 a.m. Michael does not deny this specifically, but *590 objects

to the allegation as hearsay. When asked in her deposition if she felt that calling a subordinate at home at that hour of the morning was reasonable, she replied that it was. Rezaii relayed Gooden's concerns over Michael's management both to Henry and to Senior Human Resources Generalist Jackie Sweeney, who said that she would investigate the complaints.

3. January 20 meeting between Michael and Henry

Caterpillar employees observed the Martin Luther King, Jr. holiday on January 19, 2004, so the next working day after January 16 fell on January 20. The events of that day are the basis for the bulk of Michael's claims. On the morning of January 20, Henry scheduled an 11:00 a.m. meeting with Michael. Henry asserts that one of the purposes of the meeting was to discuss Michael's unauthorized absence on January 16, but Michael disputes this, stating that her understanding was that the meeting was solely to discuss business-related matters. Michael acknowledges that, at 11:05 a.m., she had not yet arrived at Henry's office for their scheduled meeting. Instead, Henry located Michael at another meeting that had run over. Henry asked Michael at that point when she planned to arrive for their 11:00 a.m. meeting. According to Michael, Henry voiced this inquiry "in a very aggressive tone" that "rudely interrupted" the meeting Michael was then attending. Michael replied that she would meet with Henry in five minutes. McGhee and Holland, who saw Henry looking for Michael, reported that Henry appeared angry at the time.

Michael testified in her deposition that she arrived at Henry's office at approximately 11:15 a.m. What transpired next is the subject of dispute between the parties. Michael asserts that she began the meeting by apologizing for being late, but that "Ms. Henry became very aggressive, started saying yeah yeah you are going to be sorry ... then pointed a finger in Ms.

Michael's face and got so close to Ms. Michael that she could smell the nicotine from her cigarettes on her breath." According to Michael, Henry then "started jumping up and down in her chair saying you are going to pay no matter what."

At that point, Michael allegedly told Henry that she did not feel comfortable in the meeting and requested that a third party from human resources be called to join them. Henry purportedly complied with this request by contacting Sweeney, but was only able to leave a message for her. Michael testified in her deposition that she then left the room because she "felt threatened, felt like Ms. Henry wanted to physically harm her, felt nervous and uncomfortable."

Henry's account of the meeting differs significantly. She asserts that Michael was the aggressor, raising her voice during the meeting, refusing to answer questions, slapping her hand on Henry's desk, interrupting Henry, and criticizing her management skills.

Following the meeting, both Michael and Henry contacted Caterpillar's human resources department. Michael lodged a complaint describing Henry's behavior as noted above, but made no mention of any race-based discriminatory animus. Henry, too, proceeded directly to human resources and reported what she viewed as Michael's inappropriate behavior.

4. Sweeney's investigation

At some point on January 20, 2004, Sweeney began investigating both Michael's and Henry's separate complaints regarding the confrontational meeting, as well as Gooden's earlier complaint concerning Michael's management style. Among those interviewed by Sweeney was a Caterpillar*591

employee named John Jubert, who sat two cubicles away from Henry's office. Jubert told Sweeney that Michael was standing and screaming during the meeting, and that, at one point, he thought Michael might physically strike Henry. He also reported to Sweeney that Henry calmly asked Michael to leave her office on several occasions, but that Michael refused and continued to scream at Henry. Michael disputes this account as reported by Sweeney, and objects to it as hearsay. None of the other employees seated near Henry's office professed any knowledge of the meeting.

Sweeney's investigation of Gooden's complaint about Michael included interviews with all of Michael's subordinates. McGhee, one such subordinate, informed Sweeney that Michael was very demanding and would call her throughout the day, which made it difficult for McGhee to complete her tasks. She said that she had heard of Michael asking others to perform personal tasks, but that she had never been so asked. Holland, another of Michael's subordinates, reported to Sweeney that she had never been managed in the way that Michael managed her, and that she was ready to quit because of the pressure Michael placed on her. Michael objects to both of these statements as hearsay evidence.

In addition to interviewing Michael's subordinates, Sweeney spoke with other Caterpillar employees regarding their interactions with Michael. Steve Elsesser, the controller for the Nashville office, informed Sweeney that Michael had been a "challenge" to work with because she was frequently late to meetings, sometimes interrupted others during meetings, and had difficulty completing tasks on time. Sweeney also spoke with Roland Moseley, a business and asset manager in the accounting department, who noted that Michael failed to attend several scheduled training sessions and that, when she did attend, she often arrived late.

The next day, January 21, 2004, Michael met separately with both Rezaii and Elsesser. She expressed to both her belief that Henry had mistreated her, but according to Rezaii and Elsesser, Michael did not specifically assert that she had been discriminated against. Michael claims in response only that she "tried" to tell both about Henry's "discriminatory type of behavior," but was unable to do so. On or about January 22, 2004, Michael also spoke with Human Resources Specialist Carla Alexander and specifically alleged that Henry's conduct was racially motivated.

5. Disciplinary actions

Michael met with Rezaii and Sweeney on January 22, 2004. During the meeting, Rezaii explained that both the human resources department and upper management were still investigating the situation and were considering their options. Rezaii said that these options included termination, adding that Michael"should be happy to have a job." Michael was told to take paid administrative leave pending the investigation and to report for work on Monday. Rezaii also asked Michael to return her company-issued laptop computer.

The following Monday, January 26, 2004, Michael again met with Rezaii and Sweeney. At this second meeting, Rezaii explained to Michael that she had the option of either staying at her current position and being placed on a 90-day "Step 1 Performance Plan" or accepting a lateral assignment to a different position that involved the same pay and benefits. Michael notified Rezaii by email on Wednesday, January 28 that she would accept the first option and stay in her current position on a 90-day performance plan.

*592 Michael next met with Rezaii and Henry on Thursday, January 29, 2004 to discuss her performance plan. The

performance plan identified seven areas in which Michael needed to improve over the following 90 days, including notifying management if she would not be in the office, improving her timely attendance at business meetings, refraining from treating her staff as personal assistants, and refraining from contacting her staff outside of normal business hours.

According to the plan, Henry and Michael were scheduled to meet on a weekly basis so that Henry could track Michael's progress. Michael's performance in the targeted areas would be reviewed and, if significant improvement was not shown, further disciplinary action could occur. Michael characterizes Henry's actions in reviewing her performance during this period as "undermining her authority by going behind her back and asking her employees' [sic] questions regarding Ms. Michael's performance." This conduct prompted Michael to file an additional complaint against Henry with the human resources department.

6. Caterpillar's reorganization and Michael's transfer

Michael successfully completed the performance plan in April of 2004. In June of 2004, Caterpillar reorganized its information technology (IT) department. As a result of the reorganization, Michael retained many of her duties, but was no longer responsible for IT asset management. This meant that she no longer supervised any subordinates. Her job title changed from Business and Asset Manager to Financial Analyst, but her salary and benefits remained the same.

Also in June of 2004, Henry contacted Michael to inform her that a manager at Caterpillar's facility in Griffin, Georgia had specifically asked about the possibility of Michael transferring there. Michael stated in her deposition that she was "surprised" and "happy" to receive this news. She

accepted the offer and transferred to Georgia to become an engineering staff accountant with a 3% pay increase. Approximately one year later, Michael was promoted to the position of accounting supervisor. She now earns a significantly higher salary than she did in Nashville.

Michael asserts that the stress caused by the allegedly discriminatory employment situation in Nashville played a role in her subsequent breakup with her boyfriend, caused her to miscarry her child, and resulted in post-traumatic stress disorder. She also contends that, as a result of Caterpillar's actions, she has experienced sleepless nights, hair loss, weight loss, and a personality change.

B. Procedural background

Michael filed a complaint with the Equal Employment Opportunity Commission (EEOC) on January 23, 2004, the day after she was placed on paid administrative leave, alleging that Caterpillar had discriminated against her. The EEOC investigated her claim and, in September of 2004, mailed a Notice of Determination to Michael, concluding that a hostile work environment existed at Caterpillar for black employees, and that Michael was treated less favorably than other managers facing complaints lodged by subordinates. In December of 2004, after failing to reach an agreement between the parties, the EEOC issued Michael a "right-to-sue" letter.

Michael filed the present action in March of 2005. Her complaint alleges that Caterpillar racially discriminated against her, retaliated against her because of the complaints that she had filed, and created a hostile work environment, all in violation *593 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; § 1981 of the Civil Rights Act of 1991, 42 U.S.C. § 1981; and the Tennessee Human

Rights Act (THRA), Tenn.Code. Ann. § 4-21-101, et seq. The district court granted summary judgment in favor of Caterpillar on all of Michael's claims. This timely appeal followed.

A. Standard of review

[1] We review a district court's grant of summary judgment de novo. *Int'l Union v. Cummins, Inc.*, 434 F.3d 478, 483 (6th Cir.2006). Summary judgment is proper where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the district court must construe all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

B. Racial discrimination

[2][3][4] In the absence of direct evidence of racial discrimination, Michael presented her circumstantial evidence through the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Michael bears the initial burden under that framework of demonstrating the prima facie elements of her Title VII claim. *Carter v. University of Toledo*, 349 F.3d 269, 273 (6th

Cir.2003) (assuming that the plaintiff had met her initial burden by establishing a prima facie case for her Title VII race-discrimination claim). If she succeeds, this "creates a rebuttable presumption of discrimination, and the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for taking the challenged employment action."*Id.* Only if Caterpillar meets this obligation does the burden shift back to the Michael to "then prove that the proffered reason was actually a pretext to hide unlawful discrimination." *See id.*

[5] The burden-shifting framework applies to all of Michael's statutory causes of action under Title VII, § 1981, and the THRA. *See Newman v. Fed. Express Corp.*, 266 F.3d 401, 406 (6th Cir.2001) (applying the *McDonnell Douglas* framework to claims under these three acts). In order to establish a prima facie case, Michael must show that she (1) is a member of a protected group, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) was replaced by a person outside of the protected class or was treated differently from similarly situated members of the unprotected class. *See Warfield v. Lebanon Corr. Inst.*, 181 F.3d 723, 728-29 (6th Cir.1999).

[6] The district court determined that Michael's race-discrimination claim failed on the ground that she had not raised a genuine issue of material fact as to whether she had suffered an adverse employment action. An adverse employment action in the context of a Title VII discrimination claim is a "materially adverse change in the terms or conditions of employment because of the employer's actions." *Allen v. Michigan Dept. of Corr.*, 165 F.3d 405, 410 (6th Cir.1999) (quotation marks omitted).

[7][8] In the recent case of *Burlington Northern and Santa Fe Railway Co. v.* ****594** White*, --- U.S. ----, 126 S.Ct. 2405, 2415, 165 L.Ed.2d 345 (2006), the Supreme Court expanded

this court's prior definition of a "materially adverse employment action" in the context of a retaliation claim. The Court in *Burlington Northern* went to great lengths, however, to distinguish both the text and purpose of Title VII's anti-retaliation provision (§ 704(a)) from its anti-discrimination provision (§ 703(a)). *Id.* at 2411-13 (concluding that "the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment"). Consequently, *Burlington Northern* did not alter this court's understanding of a materially adverse employment action in the § 703(a) anti-discrimination context. *See, e.g., Watson v. City of Cleveland,* 202 Fed.Appx. 844, 853-55 (6th Cir.2006) (analyzing an employee's discrimination claim under the standard formulation of a materially adverse employment action, but applying *Burlington Northern*'s expanded definition to the employee's retaliation claim). As set forth in *Ford v. General Motors Corp.,* 305 F.3d 545, 553 (6th Cir.2002),

[a] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

[9] Most of Caterpillar's alleged actions against Michael fall outside of this definition. The initial confrontation between Michael and Henry, in which harsh words were exchanged, does not amount to a materially adverse action. *See Trepka v. Bd. of Educ.,* 28 Fed.Appx. 455, 461 (6th Cir.2002) (holding that a "contentious oral confrontation" involving "stern words" did not amount to harassment, let alone to a

materially adverse employment action). Nor did the requirement that Michael turn in her laptop computer or her brief placement on paid administrative leave constitute materially adverse actions. *See, e.g., Adair v. Charter County of Wayne,* 452 F.3d 482, 490 (6th Cir.2006) (requiring police officers to turn in their pagers is not an adverse employment action), *cert. denied,*--- U.S. ----, 127 S.Ct. 1828, 167 L.Ed.2d 319 (2007); *Peltier v. United States,* 388 F.3d 984, 988 (6th Cir.2004) (holding that an employee's placement on paid administrative leave pending the outcome of an investigation is not an adverse employment action).

Of all the actions that Michael alleges, her placement on a 90-day performance plan after she had returned from administrative leave comes the closest to meeting the above definition of a materially adverse employment action. Although the plan was temporary and Michael completed it successfully, this court has previously rejected the rule that only "ultimate employment decisions," such as hirings, firings, promotions, and demotions, can be materially adverse for the purpose of a Title VII retaliation or discrimination claim. *See White v. Burlington N. & Santa Fe Ry. Co.,* 364 F.3d 789, 801 (6th Cir.2004) (en banc) (holding that an employee's suspension without pay for over a month was materially adverse for the purpose of her retaliation claim even though she was later restored to her position with back pay, and reasoning that the same standard should apply to both retaliation and discrimination claims), *aff'd on other grounds,* 126 S.Ct. at 2415 (ruling that an even lower standard for material adversity applies in the context of retaliation claims). ***595** *But cf. Agnew v. BASF Corp.,* 286 F.3d 307, 310-11 (6th Cir.2002) (determining, in the context of a state-law discrimination case employing the *McDonnell Douglas* framework, that placement on a performance-improvement plan did not constitute a constructive discharge and thus was not an adverse employment action for the purpose of establishing a prima facie case of discrimination).

The specifics of Michael's performance plan create significant doubt about whether it was in fact materially adverse. Indeed, most of the plan requirements simply called for Michael to refrain from engaging in certain unreasonable practices, such as treating her subordinates like personal assistants, calling them at home outside of normal business hours, and failing to notify her supervisors when she would be out of the office for the day. The plan did not otherwise significantly alter Michael's responsibilities, pay, or work hours, although it did entail monitoring her compliance. *See Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir.1996) (reaffirming that "reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims").

Ultimately, however, we need not decide whether Michael's performance plan constituted a materially adverse action in the context of her discrimination claim. As addressed in Part II.C.2. below, even assuming that the performance plan constituted a materially adverse action and that Michael established the remaining elements of a prima facie discrimination case, she has failed to raise a genuine issue of material fact concerning whether Caterpillar's proffered legitimate reasons for the various disciplinary actions taken against her were a pretext to mask either unlawful discrimination or retaliation.

C. Retaliation

Michael's second claim asserts that Caterpillar retaliated against her for complaining that the discipline she received was based on her race. She first complained about Henry's behavior to Caterpillar's human resources department on January 20, 2004. At that time, she did not specifically state

her belief that Caterpillar's actions were motivated by race. On or about January 22, however, she indisputably asserted at another meeting with the department her belief that the treatment she received *was* racially motivated. The following day, on January 23, she filed an EEOC complaint against Caterpillar in which she again alleged racism. We therefore conclude, viewing the facts in the light most favorable to Michael, that Caterpillar was aware of Michael's protected complaints of racism no later than January 22, 2004.

[10][11] The prima facie elements of a retaliation claim are similar but distinct from those of a discrimination claim. To establish her prima facie case, Michael must show that (1) she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment.

Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir.2000) (emphasis omitted). As noted above, the Supreme Court recently held that a plaintiff's burden of establishing a materially adverse employment action is less onerous in the retaliation context than in the anti-discrimination***596** context. *Burlington Northern*, 126 S.Ct. at 2415. A materially adverse employment action in the retaliation context consists of any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* (quotation marks omitted).

[12] This more liberal definition permits actions not materially adverse for purposes of an anti-discrimination claim to qualify as such in the retaliation context. *See, e.g.,*

id. at 2415-16 (noting that a supervisor's failure to invite an employee to lunch could, under certain circumstances, amount to materially adverse retaliation action); *Halfacre v. Home Depot, U.S.A., Inc.*, 221 Fed.Appx. 424, 432 (6th Cir.2007) (remanding for reconsideration, in light of *Burlington Northern*, whether assigning the plaintiff a poor performance-evaluation score constituted an adverse employment action for the purpose of setting forth a retaliation claim). The retaliatory actions alleged by Michael, including her brief placement on paid administrative leave and the 90-day performance plan, appear to meet this relatively low bar.

[13][14] This leaves only the requisite fourth and final element of a prima facie case-showing a causal connection. "To establish a causal connection, a plaintiff must proffer evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action." *Dixon v. Gonzales*, 481 F.3d 324, 333 (6th Cir.2007) (quotation marks omitted). "Although temporal proximity itself is insufficient to find a causal connection, a temporal connection coupled with other indicia of retaliatory conduct may be sufficient to support a finding of a causal connection." *Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 737 (6th Cir.2006).

[15] Michael's best argument for a causal connection between the adverse actions she alleged and the internal complaint she filed with Caterpillar's human resources department relies on (1) the two-day proximity between her initial complaint and Caterpillar's instigation of disciplinary action, (2) the fact that she had recently received a positive evaluation and an award indicating better-than-satisfactory job performance, (3) the fact that Henry, who also was the subject of a complaint, suffered no disciplinary action, and (4) Michael's claim that Caterpillar violated an internal company policy by taking disciplinary action against her without first providing her

written notice of the underlying complaints. These facts, in our opinion, are sufficient to satisfy the final element of causation. Consequently, we conclude that Michael established a prima facie case for her retaliation claim. We nonetheless conclude that her retaliation claim fails because Caterpillar has shown legitimate, nonretaliatory reasons for its actions, which Michael has been unable to rebut with proof that raises a genuine issue of material fact as to whether those reasons were pretextual. Caterpillar's actions and its proffered nondiscriminatory explanations are more fully analyzed below.

1. Michael's placement on paid administrative leave

[16] As mentioned above, Michael attended a meeting with Rezaii and Sweeney on January 22, 2004, at which time Michael was placed on two days of paid administrative leave and was required to turn in her laptop computer. Rezaii explained in her deposition that this action was taken due to the pending investigation of the complaints by both Gooden and Henry concerning Michael's management style and professionalism. This proffered explanation finds strong support in the record. First, Michael concedes that Sweeney was, *597 in fact, investigating several complaints against Michael at that time. Rezaii would clearly have known of the complaints against Michael and the pending investigation at the time of Michael's suspension because Gooden had complained directly to Rezaii, Rezaii had spoken with Henry, and Rezaii had directed Sweeney to begin an investigation.

[17] Because Caterpillar articulated legitimate, nondiscriminatory reasons for imposing the challenged disciplinary action, the burden shifted to Michael to demonstrate that Caterpillar's proffered reasons were actually a pretext to hide unlawful retaliation. *See Carter*, 349 F.3d at 273. "To meet [her] burden on pretext, the plaintiff must

produce evidence sufficient that a reasonable finder of fact could reject the employer's proffered reason." *Haughton v. Orchid Automation,* 206 Fed.Appx. 524, 531 (6th Cir.2006). Michael"can demonstratc pretext by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Hopson v. DaimlerChrysler Corp.,* 306 F.3d 427, 434 (6th Cir.2002) (quoting *Dews v. A.B. Dick Co.,* 231 F.3d 1016, 1021 (6th Cir.2000)).

Michael essentially concedes the basis in fact for Caterpillar's actions-Sweeney's then-pending investigation of the various complaints against Michael. Regarding whether the pending investigation was sufficient to warrant Michael's brief placement on paid leave, this court has upheld the employer's action in numerous cases in which employees have been placed on paid leave pending investigations of complaints against them. *See, e.g., Scott v. Metro. Health Corp.,* Nos. 05-1948, 05-2642, 06-1122, & 06-1652, ---Fed.Appx. ----, ----, 2007 WL 1028853, at *5 (6th Cir. Apr.3, 2007) (holding that an employee's placement on paid administrative leave pending an investigation did not amount to retaliation); *Peltier v. United States,* 388 F.3d 984, 988-89 (6th Cir.2004) (concluding that the placement of an employee on paid leave during a pending investigation, even if adverse, was not pretextual).

No genuine issue of material fact arises in connection with Michael's placement on leave because Caterpillar's proffered reason, as expressed by Rezaii in her deposition, focused solely on the *pending investigation* of the accusations raised against Michael, not the *results* thereof. Rezaii explained that placing Michael on leave was necessary to avert any potential retaliation by Michael against Gooden, her subordinate who had lodged the complaints that initiated the investigation.

Michael asserts two principal courterarguments aimed at establishing that Caterpillar's proffered justification for placing her on administrative leave was pretextual: (1) her recent positive performance review, and (2) the fact that Caterpillar did not similarly place Henry on paid leave despite Michael's complaint against her. Michael's positive performance review, however, occurred *prior to* the events that Caterpillar proffers as justification for placing Michael on leave. That review, therefore, could not have encompassed the events primarily at issue. This leaves to be explained the justification for Caterpillar's treatment of the accusations against Michael in light of its nonreaction to her accusations against Henry.

On this latter point, Rezaii correctly pointed out in her deposition that the nature and extent of the complaints that Gooden and Henry filed against Michael differed from Michael's complaint against Henry. Rezaii, at the time of the January 22, 2004 meeting, was aware that Michael (1) worked from home on January 16 without prior notification, (2) had been accused ***598** by Gooden of managing her subordinates in a degrading manner by calling them at odd hours and having them perform personal tasks, and (3) had been accused by Henry of showing up late as well as acting inappropriately and insubordinately at a meeting held to discuss the above matters. Sweeney, who also attended the meeting at which Michael was placed on paid leave, had begun her investigation and had already substantiated some of the allegations concerning Michael's management problems.

The only allegations against Henry, in contrast, came from Michael-herself the subject of several pending complaints-and involved just one incident in which Henry had allegedly berated Michael after she had shown up late for a meeting. Furthermore, given that Michael was to be placed on

administrative leave, no concerns of retaliation by Henry against Michael would require placing Henry on leave as well during the investigation. Even drawing all inferences in favor of Michael, these significantly different circumstances fully rebut Michael's argument that Caterpillar's failure to place Henry on leave demonstrates that its proffered justification for placing Michael on leave was pretextual.

2. Michael's 90-day performance plan and related monitoring

[18] Michael also argues that, following her return from administrative leave, Caterpillar's imposition of a 90-day performance plan and its monitoring of her pursuant to the plan amounted to retaliation. On January 26, 2004, Michael met with Rezaii and Sweeney to discuss Michael's disciplinary options. They informed Michael that she could either accept placement on a 90-day performance plan and continue in her current position or reject the plan and relinquish her managerial responsibilities.

After electing to accept the performance plan, Michael met again with Rezaii and Sweeney to go over the performance plan on January 29. Michael asserts that the proffered grounds for imposing the performance plan were "baseless" and that the plan was instead imposed as a form of retaliation for the complaints that she had filed. She also alleges that Henry improperly monitored her work performance during the plan period. Because monitoring was part and parcel of the performance plan, however, this allegation does not constitute a separate disciplinary action. Caterpillar's proffered reason for imposing the performance plan was not simply the pending complaints against Michael, but was also based on what had been uncovered as a result of Sweeney's investigation. In other words, Caterpillar asserts that it "investigated those complaints and took action consistent

with its investigation."

[19] We initially note that Michael's principal objection to many of the investigative findings was that they were based on hearsay. As this court recently explained under similar circumstances, however, witness statements contained in an investigative report may be considered on summary judgment "not to prove their truth, ... but to demonstrate the state of mind and motive of Defendant's managers in discharging Plaintiff." *Haughton,* 206 Fed.Appx. at 532.

[20] Furthermore, Michael's disagreement with the facts uncovered in Caterpillar's investigation does not create a genuine issue of material fact that would defeat summary judgment "as long as an employer has an honest belief in its proffered nondiscriminatory reason." *Majewski v. Automatic Data Processing, Inc.,* 274 F.3d 1106, 1117 (6th Cir.2001). The key inquiry in assessing whether an employer holds such an honest belief is "whether the employer made a reasonably informed and ***599** considered decision before taking" the complained-of action. *Smith v. Chrysler Corp.,* 155 F.3d 799, 807 (6th Cir.1998). An employer has an honest belief in its rationale when it "reasonably relied on the particularized facts that were before it at the time the decision was made." *Majewski,* 274 F.3d at 1117 (citation and quotation marks omitted). "[W]e do not require that the decisional process used by the employer be optimal or that it left no stone unturned." *Smith,* 155 F.3d at 807.

As part of her investigation, Sweeney interviewed Michael's subordinates, other Caterpillar employees with whom Michael worked, and those employees who might have overheard Michael's January 20, 2004 confrontation with Henry. Sweeney's investigation revealed that many of Michael's coworkers, including Elsesser, Holland, McGhee, Moseley, and Rezaii, found Michael difficult to work with and often tardy. Although Michael points out that Gooden's

specific accusations that she required her subordinates to perform personal tasks was never corroborated, the investigation nevertheless pointed to other serious issues with Michael's management style.

Sweeney's investigation of the initial confrontation between Henry and Michael also revealed additional questions regarding Michael's professionalism. The only independent witness to the exchange reported that Michael was "screaming" at Henry, that she refused to leave Henry's office, and that her actions were so aggressive that the witness was concerned that Michael might physically assault Henry. On top of these reports, Michael concedes that she worked from home on January 16, 2004 without notifying any of her supervisors that she would not be in the office that day, and that she arrived late to her meeting with Henry on January 20, 2004.

Because Caterpillar proffered these legitimate, nondiscriminatory reasons for imposing the performance plan, the burden shifted to Michael to raise a genuine issue of material fact as to whether Caterpillar's reasons were actually a pretext designed to mask unlawful discrimination. *See Carter*, 349 F.3d at 273. Michael again points to her positive performance review just weeks before the January 20, 2004 incident and the fact that Caterpillar did not similarly discipline Henry as a result of Michael's accusations against her. For the same reasons outlined above, however, these arguments fail to establish pretext under the circumstances. Michael also raises factual objections to the job-performance concerns mentioned in Caterpillar's investigation, but she cannot defeat Caterpillar's honest belief in her performance deficiencies simply through her own contrary assertions. *See Majewski*, 274 F.3d at 1117.

Michael's only contention that calls into question Caterpillar's honest belief in its proffered justification for her performance

plan derives from Rezaii's deposition testimony. Rezaii initially stated that she could not recall the results of Sweeney's investigation, but then later said that she believed that the investigation had boiled down to "he said/she said," with no real findings. The extensive documented results of Sweeney's investigation, however, refute this. Moreover, Sweeney herself attended the meetings at which Michael was disciplined, and the human resources department-not Rezaii-put together Michael's performance plan. Sweeney's supervisor, Human Resource Manager Gari Cowan, also stated in her deposition that Sweeney's investigation pointed to issues with Michael's management style and indicated that Michael's was the only voice raised during her January 20, 2004 confrontation with Henry. Even if Rezaii was unaware of these findings at the time Michael's*600 performance plan was imposed, she was aware of Gooden's complaint because he had come directly to her, and she was also aware of Michael's January 16, 2004 absence from work.

The above analysis demonstrates that Caterpillar presented sound, nondiscriminatory reasons for the action that it took based on a reasonable investigation of events that occurred after Michael's favorable performance review. We therefore find no error in the district court's grant of summary judgment regarding Michael's retaliation claim because she was unable to raise a genuine issue of material fact as to whether Caterpillar's proffered legitimate explanation was pretextual.

D. Hostile work environment

[21][22] Michael's final claim asserts that Caterpillar's actions created a hostile work environment. To establish a hostile-work-environment claim, Michael must show that "(1) she was a member of a protected group, (2) she was subjected to unwelcome harassment, (3) the harassment was

based upon the employee's protected status, such as race or gender, (4) the harassment affected a term, condition, or privilege of employment, and (5) the defendant knew or should have known about the harassing conduct but failed to take any corrective or preventive actions." *Farmer v. Cleveland Pub. Power,* 295 F.3d 593, 605 (6th Cir.2002), *abrogated on other grounds by White v. Columbus Metro. Hous. Auth.,* 429 F.3d 232 (6th Cir.2005). Actionable harassment arises where "the workplace is permeated with discriminatory intimidation, ridicule, and insult ... that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* (alterations in original) (quoting *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)).

[23] In accordance with these elements, a hostile-work-environment claim is cognizable only if the purported harassment, viewed in conjunction with all of the circumstances, occurred because of the employee's protected status. *Farmer,* 295 F.3d at 605; *see also Jackson v. Quanex Corp.,* 191 F.3d 647, 661-62 (6th Cir.1999) (examining the "totality of the circumstances" and explaining that "even though a certain action may not have been specifically racial in nature, it may contribute to the plaintiff's proof of a hostile work environment if it would not have occurred but for the fact that the plaintiff was African American").

[24] Michael's hostile-work-environment claim arises out of the same treatment that she points to with respect to her retaliation claim, with the addition of Henry's alleged conduct at the January 20, 2004 meeting. (This meeting occurred before Michael had filed any complaints, and therefore could not be part of her retaliation claim.) Both claims suffer from the same problem: Caterpillar has demonstrated an honest belief in the nondiscriminatory

explanation that it offered for its actions that Michael has failed to rebut.

Regarding the January 20 meeting, Sweeney's investigation largely corroborated Henry's account that Michael-not Henry-acted inappropriately. Moreover, regardless of whether a shouting match broke out at the meeting and whether Michael started it, federal courts are generally not in the business of refereeing such common workplace conflicts. *See, e.g., Vore v. Ind. Bell Tel. Co.*, 32 F.3d 1161, 1162 (7th Cir.1994) (noting that federal law "does not guarantee a utopian workplace or even a pleasant one.... [P]ersonality conflicts between employees are not the business of the federal courts.").

***601** Michael ultimately failed to show that the alleged harassment was "severe or pervasive." *See Harris*, 510 U.S. at 21, 114 S.Ct. 367. She instead admits that no one at Caterpillar ever made overtly racist remarks or threats to her, that Henry never raised her voice or made a threat apart from what allegedly took place at the January 20, 2004 meeting, and that the only "harassment" she experienced was the imposition of the disciplinary action taken against her. We therefore conclude that Michael has failed to raise a genuine issue of material fact that would support her hostile-work-environment claim.

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

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